IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 15499 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RIZVAN @ AKBAR @ SALIM ABDUL GAFUR SHAIKH

Versus

STATE OF GUJRAT

Appearance:

1. Special Civil Application No. 15499 of 2004

MS BANNA DUTTA for MR AR SHAIKH for Petitioner No. 1

MS HANSA PUNANI AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 27/01/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226 of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the

order passed against him by Police Commissioner, Surat City, on 18th May, 2004 in exercise of powers conferred by him under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The detenu is detained as bootlegger from 31st May, 2004 in pursuance of the above said order.

2. The grounds of detention as placed on record reveal that the detaining authority took into consideration two types of materials to arrive at subjective satisfaction. Firstly, the fact of filing of a criminal case against the petitioner under the Bombay Prohibition Act, and secondly, two in-camera statements of the witnesses, whose identity is not disclosed claiming privilege under Section 9(2) of the PASA Act.

3. A crime, bearing registration No.833 of 2004, came to be registered against the petitioner on 7th April, 2004 under the Bombay Prohibition Act at Southern Zone Police Station, Surat, whereby it was alleged that the petitioner was found in possession of 1206 bottles of foreign liquor. The petitioner is released on bail in the said crime. The detaining authority considered exhaustively and thoroughly the investigating papers in the said case registered against the petitioner. The detaining authority also took into consideration two in-camera statements as recorded by the sponsoring authority on 4th May, 2004 and 5th May, 2004 and verified by the detaining authority on 14th May, 2004. Out of these two incamera statements, one statement refers to the incident took place on 20th April, 2004. When the witness was going towards Pandesara area in his passenger carriage vehicle along with the passengers, the petitioner along with his other accomplices, named in the statement, came in one Maruti van car and picked up quarrels with the witness on the excuse that the witness was providing information to the police about illegal transportation of foreign liquor by the petitioner. The accomplices of the petitioner were having weapons like sticks and hockey and they started to beat the witness. They also through the stick and other weapons, damaged the vehicle of the witness. The drivers of other vehicles parked there and other persons were gathered near the place of incident, but nobody dared to intervene. In the meantime, from the crowd, some persons shouted that the police was coming, and at that juncture some vehicle like police jeep appeared. On this count, the petitioner and his accomplices after damaging other vehicles parked there through the blows of sticks, etc. escaped towards Sachin in Maruti Van car. The fact that the petitioner and his gang had assaulted in the area, was spread around, and on account of the fear of the

petitioner, the traffic was blocked in that area. The daily normal life of the persons were disrupted. The witness thereafter did not dare to go in the said area. The area was terror stricken and the people were feeling insecurity. While the second, incamera statement refers to the incident occurred before 20 days of 5th April, 2004. The witness stated that he was standing with his passenger carriage vehicle parked in Sachin area, at that time, the petitioner and his accomplices named in the statement came in white maruti van car. The witness was directed by them to transport the quantity of foreign liquor from village Eklera to Limbayat in his vehicle. On refusal by the witness, the petitioner and his accomplices got excited, and one of the members of the gang, caught hold of the witness from shirt-collar and stated that hands and legs of the witness were to be broken. All of them took out weapons like sticks and hockey sticks from the vehicle they had brought to the place of incident and started to beat the witness. On shouting by the witness, other shop owners, drivers of the vehicles and other passers-by gathered near the place of the incident. The petitioner and his accomplices started to beat the persons gathered around and so the crowd was dispersed. The petitioner and his gang also damaged the business place of the persons around. The persons started running and, therefore, public traffic was disrupted and the business in the area was closed. The area became terror stricken. By act of this supplication, the witness could save himself with great difficulties. From the above material, the detaining authority came to the conclusion that the petitioner was headstrong person and was of ferocious tendency. The detaining authority came to the conclusion that the petitioner and his accomplices were keeping deadly weapons, and after forming gang, were harassing the innocent citizens, particularly, whoever became obstacles to the business of the petitioner of selling foreign liquor. In view of the detaining authority also, the petitioner was a bootlegger within the meaning of the PASA Act and was engaged in storing, selling and transporting the foreign liquor. The detaining authority after considering the remedies available in general law, came to the conclusion that the bootlegging activities of the petitioner was required to be prevented forthwith, and for that there was no other alternative, except to detain the petitioner under the PASA Act. The detaining authority, therefore, passed the order of detention of the petitioner which is under challenge in this petition.

3. Learned advocate Ms Banna Dutta for the petitioner and learned AGP Mrs.H.B.Punani for the

respondent No.3 were heard at length.

4. Out of various grounds urged on behalf of the petitioner and opposed and controverted by the learned AGP, it appears that this petition can be examined and disposed of only on the issue that whether there was credible material placed before the detaining authority to come to the conclusion that by the activities of the petitioner, the public order was disturbed and public health was adversely affected.

5. To reach to the subjective satisfaction that the bootlegging activities of the petitioner were prejudicial to the maintenance of public order and public health, the detaining authority must rely upon credible and cogent material indicating that the activities of the petitioner directly or indirectly were causing or were likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health.

6. In the present case, to reach to the above subjective satisfaction, the detaining authority, as above referred, relied upon two types of materials. While undertaking this exercise to reach to a subjective satisfaction about the disturbance of the public order, the detaining authority must draw a line between the cases falling under breach of law and order and cases falling under breach of public order. Now referring to the solitary criminal case filed against the petitioner under the Bombay Prohibition Act and the investigation papers, as placed on record, it is clear that this case is filed against the petitioner on the ground that the petitioner was dealing in foreign liquor. Merely filing of a criminal case, must not have any bearing on the question of maintenance of public order. At the most, this may be a breach of law, for which the petitioner may be tried and may be punished, if found guilty, but surely the act constituting the offence cannot be said to have affected the even tempo of the life of the community.

7. It is also necessary that to reach to a subjective satisfaction that the alleged activities of the petitioner were prejudicial to the maintenance of public order and public health, it would be necessary for the detaining authority to consider the fall out, reach and impact of the activities of the petitioner. After considering this aspect, the detaining authority come to the conclusion that whether potentiality of the alleged activities of the petitioner was capable of disturbing

the public order. The two incidents narrated by the witnesses through incamera statements and taken into consideration by the detaining authority appears to be more individual dispute than to involve society at large or disturbing the even tempo of the life of the community. The potentiality, fall out, reach and impact of the activities complained of in two incamera statements, from the bare reading, do not disclose capability to disturb the even tempo of the life of the community or society at large or section of the society. True it is that, the witnesses have employed certain phrases in their statements, but those phrases cannot carry the case of the witnesses to the extent of maintenance of public order by the activities of the petitioner. There was no widespread danger, alarm, fear etc., which could be inferred from the statements of the witnesses even after taking them on their face value. At the most, those incidents could be branded as breach of law and order and it could be taken care of by general law, but these activities cannot be branded to be prejudicial to the maintenance of public order as envisaged by the PASA Act.

8. In the matter of Ashokbhai Jivraj @ Jivabhai Solanki Vs. Police Commissioner, Surat & Ors., reported in 2000 (1) G.L.H. 393, wherein after considering many decisions of the Apex Court, the Division Bench of this Court has observed in paragraphs No.21 and 22 as under.

"21. The Division Bench, following the above cases, observed that in the opinion of the Supreme Court, the selective phrases in the statements would not take out the case from maintenance of law and order to that of maintenance of public order and as power of detention could not be used for maintenance of law and order, but only for public order, the order of detention made in such circumstances could not be upheld.

Again, in Mustakmiya Jabbarmiya Shaikh v. M.M.Mehta, Commissioner of Police and others, 1995 (2) GLR 1268 (SC), the Supreme Court considered the relevant decisions on point including the decision in Arun Ghosh v. State of West Bengal, 1979 (1) SCC 98 and held that stray incidents would not affect "public order" and order of detention cannot be passed in such cases.

22. So far as the cases against the detenu are

> concerned, they have already been registered. They were against persons mentioned therein which is stated in the grounds of detention by the detaining authority. Regarding two statements, having taken into account the law laid down by the Supreme Court in Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740 and reiterated from time to time including the decisions referred to by us hereinabove, the case falls under the maintenance of "law and order" and not "public order". The subjective satisfaction arrived by the detaining authority, therefore, cannot be said to be legal, valid and in accordance with law. Since in the facts and circumstances, an order of detention could have been passed by the detaining authority for maintenance of "public order", the order deserves to be quashed and is hereby set aside. The detenu is ordered to be set at liberty forthwith unless required in any other case. Appeal is accordingly allowed. No order as to costs."

9. Therefore, having gone through the facts of the present case entirely, it clearly appears that the facts of the present case are squarely covered by the above decision of this Court in the case of Ashokbhai Jivraj (supra), the subjective satisfaction arrived at by the detaining authority in respect of disturbance of public order by the alleged activities of the petitioner cannot be said to be legal, valid and in accordance with law. The order under challenge, therefore, is required to be quashed and set aside on this ground alone.

10. In the result, this petition is allowed. The order passed by the Police Commissioner, Surat City on 18th May, 2004 against the detenu in exercise of powers under Section 3(2) of the PASA Act is hereby quashed and set aside. The petitioner - Rizvan alias Akbar alias Salim Abdul Gafur Shaikh is hereby ordered to be set at liberty forthwith, if he is not required to be detained in Jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. Vora,J.]

p.n.nair